FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 421

ARSENAL BUILDING CORPORATION and SPEAR & CO., INC.,

Petitioners,

against

MEYER GREENBERG, suing in behalf of himself and other employees and former employees of Defendants similarly situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF

ROBERT R. BRUCE,
KENNETH C. NEWMAN,
Counsel for Petitioners.

McLANAHAN, MERRITT, INGRAHAM & CHRISTY,
40 Wall Street,
New York, N. Y.

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Come now Arsenal Building Corporation and Spear & Co., Inc., your petitioners, by Robert R. Bruce and Kenneth C. Newman, their counsel, and move this Honorable Court that it shall by certiorari or other proper process directed to the United States Circuit Court of Appeals for the Second Circuit, require said Court to certify and remove to this Court for its review and determination, a certain case lately pending in said Court, wherein your petitioners were defendants-appellants-appellees and Meyer Greenberg, suing in behalf of himself and other employees similarly situated, were plaintiffs-appellees-appellants, and to that end your petitioners aforesaid now tender herewith their petition with a certified copy of the record in said cause.

ROBERT R. BRUCE,
KENNETH C. NEWMAN,
Counsel for Petitioners.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioners, Arsenal Building Corporation and Spear & Co., Inc., respectfully show to this Court as follows:

Parties and History of the Proceedings

1. Your petitioners are domestic corporations, organized and existing under the laws of the State of New York and maintaining places of business in the City, County and State of New York. Your petitioner, Arsenal Building Corporation, is the owner of a loft building known as the "Arsenal Building", located at 463 Seventh Avenue, New York City. Your petitioner, Spear & Co.,

Inc., acts as agent in managing the building owned by your petitioner, Arsenal Building Corporation.

2. Respondent is now and was during the period embraced by this action, an elevator operator in the Arsenal Building.

3. Respondent commenced this action on August 13, 1942, in behalf of himself and 25 other building service employees of the Arsenal Building similarly situated, in the United States District Court for the Southern District of New York. Respondent sued under Section 16 (b) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. Sec. 201, et seq.) to recover overtime wages allegedly due respondent and the other employees under Section 7 (a) of that Act for their respective periods of employments between October 24, 1938, the effective date of the Act, and February 5, 1942, together with liquidated damages of an equal amount, attorneys' fees and costs.

4. Petitioners' answer admitted that respondent was covered by the Act, this Court, in *Arsenal Building Corp. et al.* v. *Walling*, 316 U. S. 517, decided June 1, 1942, having so held with respect to all the employees here involved, and having issued its mandate directing petitioners to refrain from further violations of the Act. In addition, petitioners pleaded several affirmative defenses and an equitable counterclaim predicated upon the fact that the entire employment of respondent and the other employees had been covered by collective bargaining agreements between the parties and upon their conduct under those agreements. In brief, the affirmative defenses were (1) payment based upon a construction of the collective agreements in compliance with the Act; (2) estoppel against respondent's complete claim; (3) estoppel against respondent's claim for liquidated damages, attorneys' fees and costs alone; (4)

unconstitutionality of Section 16 (b) of the Act for want of due process if recovery of liquidated damages were permitted under all the circumstances of this case; (5) right to arbitrate respondent's claims; and finally (6) a counterclaim for reformation of the collective bargaining agreements upon the ground that they were entered into and carried out by the parties under a mutual mistake of law and fact or of law alone regarding the application of the Act to their employment relationship and that the true intention of the parties was thwarted by such mutual mistake.

5. Trial of the action was had before the Honorable Henry W. Goddard, District Judge of the United States District Court for the Southern District of New York, during February 1943. Judge Goddard filed an opinion on July 12, 1943 (Record 464-472) sustaining respondent's claim and judgment (R. 454-456) was entered on Oct. 26, 1943 pursuant to findings of fact and conclusions of law (R. 25-36). The judgment entered against both petitioners in favor of respondent and the other employees similarly situated, totaled $13,692.46, consisting of $5,379.58 for overtime compensation and an equal amount of $5,379.58 for liquidated damages, $2,151.80 representing averaged interest upon the total recovery of overtime compensation and liquidated damages from the midpoint in the period October 24, 1938 through February 5, 1942, to the date of the entry of judgment, $750.00 attorneys' fees and $31.50 costs and disbursements. Interest on the overtime and liquidated damages had not been prayed for in the complaint and was not included in the original judgment entered on October 26, 1943. However, the original judgment was amended nunc pro tunc by order dated February 5, 1944 (R. 462-463), upon respondent's motion after both parties had filed notices of appeal from the original judgment.

6. Appeals were thereupon taken by petitioners and respondent to the United States Circuit Court of Appeals for the Second Circuit (R. 473, 474). Petitioners appealed

from the judgment in its entirety; respondent only from that part of the judgment granting him a counsel fee of $750.00 on the ground that such fee was insufficient. On July 18, 1944, the Circuit Court modified the judgment of the District Court by increasing the attorneys' fee allowed the respondent to $1,250.00, but otherwise affirmed the judgment.

7. On August 2, 1944, the Second Circuit Court entered its order upon the stipulation of the parties staying and withholding its mandate in this case for a period of 30 days, pending this application by your petitioners for a writ of certiorari to said Court.

Jurisdiction

8. The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, 28 U. S. C. 347 as amended by the Act of February 13, 1925, to which Rule XXXIX of the Rules of this Court is applicable.

Facts as Established by the Findings

9. The relevant findings of the Trial Court are substantially as follows (both paraphrased and quoted findings being assigned their actual numbers in parentheses).

> "(2) During the period covered by the complaint, defendant Arsenal Building Corporation was the owner of a 22-story and basement loft building located at 463 Seventh Avenue, New York, N. Y., known as the Arsenal Building (referred to hereafter as 'the building')" (R. 26).
>
> "(3) During the period covered by the complaint, defendant Spear & Co. Inc. acted as the agent of and for the account of defendant Arsenal Building Corporation in the management and operation of the building, had authority to hire and fire employees engaged in the operation and maintenance of the building, is-

sued instructions to and controlled, directed and supervised the employees in the performance of their duties and otherwise acted in the interest of defendant Arsenal Building Corporation in relation to such employees" (R. 26).

"(4) During the period in question defendant Spear & Co. Inc. performed many of the services customarily performed by an owner managing his own building; and defendant Spear & Co. Inc. had a branch office in the Arsenal Building and was not only the rental agent for it but hired the personnel of the building, paid them their wages, for which they were reimbursed by the owner, directed and supervised them in the performance of their duties" (R. 26).

"(5) During the period covered by the complaint plaintiff Meyer Greenberg was employed by defendants as an elevator operator in the Arsenal Building" (R. 26).

"(24) Since about 1934, there have been in existence in New York City two associations of building owners and managing agents, known as Midtown Realty Owners Association, Inc. and Penn Zone Association, Inc. (called herein the Associations), whose members owned and managed real property located within the said Garment Center area and whose principal purposes were to advise their members with regard to their labor relations, to assist them in the negotiation of contracts with representatives of their building service employees and to promote friendly relations with the various unions in the field" (R. 31).

"(25) During the period covered by the complaint, defendant Arsenal Building Corporation was a member of the said Midtown Realty Owners Association, Inc." (R. 31).

"(26) During the period covered by the complaint, defendant Arsenal Building Corporation was a party to, and the said Arsenal Building was a signatory building under, certain master collective bargaining agreements entered into between the said Associations, acting on behalf of their members, and certain labor

unions including primarily Local 32-B, Building Service Employees International Union A. F. of L. (called herein the Union), acting on behalf of the members of said Union, governing the terms and conditions of employment of building service employees in the so-called signatory buildings owned or operated by the members of said Associations, to wit, the so-called Extended Mahoney Agreement dated February 19, 1936, as amended by the so-called Alger Agreement dated May 21, 1937 and the Arbitration Award made thereunder and part of said Agreement known as the Alger Award, effective February 1, 1938, and the so-called McGrady Agreement, effective February 4, 1939, together with the so-called Wolff Award, effective August 4, 1940, made under and as a part of said McGrady Agreement. The said McGrady Agreement is typical of the collective bargaining agreements involved in this action and a complete copy thereof, being Plaintiff's Exhibit 3, is incorporated herein and made a part of this finding" (R. 31-32).

"(27) During the period covered by the complaint, plaintiff Meyer Greenberg and all other building service employees employed in the Arsenal Building were members of Local 32-B, Building Service Employees International Union A. F. of L." (R. 32).

"(28) During the period covered by the complaint, the plaintiff Meyer Greenberg and all the other employees of the Arsenal Building were employed and paid in accordance with said collective bargaining agreements" (R. 32).

"(29) During the period covered by the complaint, plaintiff Greenberg and all the other employees of the Arsenal Building were employed and actually worked, pursuant to said collective bargaining agreements, on the basis of a specified maximum work week at a specified regular weekly wage and were paid at the rate of time and one-half for all hours worked in excess of such regular maximum work week" (R. 32-33).

"(30) Plaintiff Meyer Greenberg in particular was employed and actually worked in the Arsenal Build-

ing during the following periods on the following basis:

October 24, 1938 to February 2, 1939—$27.75 per week for a 48-hour week
February 3, 1939 to August 1, 1940—$28.75 per week for a 47-hour week
August 2, 1940 to February 5, 1942—$29.33 per week for a 46-hour week (R. 33).

"(31) During the period between June 25, 1938, when the Act was passed and February 3, 1942 when the McGrady Agreement expired, no claim was ever made by the Union to the Associations or the Realty Board that the employees whom the Union represented were covered by and entitled to the benefits of the Act in any respect" (R. 33).

"(32) In the Wolff arbitration in August, 1940 under the McGrady Agreement wherein it was provided that, at the request of either party, the question of wages for the period from August 4, 1940 to February 3, 1942 should be arbitrated if the parties do not agree thereon, no claim was ever made by the Union that the employees whom it represented were entitled to the benefits of the Act in any respect" (R.33).

"(33) No claim was ever made by the Union to defendant Arsenal Building Corporation or defendant Spear & Co., Inc. that the members of the Union employed in the Arsenal Building were entitled to the benefits of the Act in any respect or to any other or different pay or rate of pay than that prescribed by the collective bargaining agreements involved in this case" (R. 33-34).

"(14) Defendants failed to prove a mutual mistake of either fact or law respecting applicability or non-applicability of the Fair Labor Standards Act, in connection with the entering into of the various agreements referred to in defendants' answer and particularly the so-called McGrady Agreement" (R. 29).

"(16) Defendants failed to prove a mutual understanding of the parties to the negotiations leading up to the so-called McGrady Agreement, or any other

agreement referred to in defendants' answer as to any specific provision or actual terms intended to be included in or constitute their agreement as to wages and hours in the event that the Fair Labor Standards Act should apply'' (R. 29-30).

"(17) Defendants delayed unreasonably in asking the relief sought by the counterclaim for reformation" (R. 30).

(11) There was neither bad faith nor wilful violation of the Act by petitioners (R. 29).

(11) The full amount of the overtime due respondent and the other employees similarly situated for the period October 24, 1938 to February 5, 1942, as determined by the Wage and Hour Division of the United States Department of Labor, was offered to respondent and the other employees before commencement of the action and refused (R. 29).

Questions Presented

10. On the basis of the foregoing, petitioners desire this Court to review the following questions:

(a) Whether collective bargaining agreements which provided no express hourly rate of pay but called for a specified regular weekly wage and overtime compensation at the rate of time and one-half for hours in excess of the regular workweek (of 47 and 46 hours in successive periods), were in compliance with Section 7(a) of the Act where the regular hourly rate reasonably to be implied therefrom always exceeded the minimum hourly rate required by Section 6 of the Act.

(b) Whether the collective bargaining agreements and the conduct of respondent employees thereunder in relation to petitioners give rise to an equitable estoppel against the recovery of liquidated damages, interest, attorneys' fees and costs by respondents. Implicit in this question, whether any concept of public

policy embedded in the Act or in the law generally precludes the raising of such an estoppel.

(c) Whether, under the circumstances of this case, petitioners' offer to pay the full overtime compensation due under Section 7 (a) of the Act promptly after coverage of building service employees was determined by this Court, precluded any further liability for liquidated damages, interest, attorneys' fees and costs.

(d) Whether allowing respondent employees to recover liquidated damages, interest, attorneys' fees and costs under all the circumstances of this case produces a result so harsh and grossly inequitable as to constitute an application of Section 16 (b) of the Act that is violative of due process under the Fifth Amendment.

(e) Whether the findings of the Trial Court, affirmed by the Circuit Court, that there was no mutual mistake of fact or law in the making and carrying out of the collective bargaining agreements and no consequent frustration of the true intention of the parties, and also that petitioners delayed unreasonably in seeking reformation of the collective bargaining agreements, are not clearly erroneous and contrary to the great weight of evidence.

(f) Whether as held by the Second Circuit Court of Appeals "reformation of a contract which in terms violated a remedial statute would tend to frustrate the administration of the Act and contravene its policy."*

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* The quotation is from the opinion of the Second Circuit Court of Appeals in *Adams* v. *Union Dime Savings Bank*, which involved some but not all the questions raised by this case. We refer to the opinion of the Circuit Court in the *Adams* case because of the following reference by the Circuit Court in the instant case: "Our opinion in *Adams* v. *Union Dime Savings Bank* sufficiently discusses these questions and requires an affirmance of the judgment as to overtime and liquidated damages as against Arsenal Building Corporation" (R. 481). A petition for certiorari in the *Adams* case is now before this Court, October Term, 1944, No. 387.

(g) Whether Section 3(d) of the Act defining the word "employer" embraces an agent such as Spear & Co., Inc., and abrogates the common law rule that an agent is not liable for wages contracted on behalf of his principal unless expressly assumed.

(h) Whether Section 16(b) of the Act in providing for liquidated damages in an additional amount equal to unpaid minimum wages or unpaid overtime compensation under Sections 6 and 7 of the Act and also in allowing a reasonable attorneys' fee and costs of the action, did not establish a uniform and exclusive measure of recovery under the Act and thereby preclude the allowance of any additional recovery of interest under State law, in this case, Section 480 of the New York Civil Practice Act.

Reasons in Support of Petition

11. Five of the questions presented in this case (paragraphs 10 (b), (c), (f), (g) and (h)) are novel and important questions in the construction and application of the Fair Labor Standards Act of 1938 which have not been but should be settled by this Court. Two of these questions (paragraphs 10 (b) and (f)) have also been presented to this Court by the petition for certiorari in *Union Dime Savings Bank*, petitioner v. *Ira Adams, et al.*, respondents, October Term, 1944, No. 387, which has heretofore been filed. The questions set forth in paragraphs 10 (g) and (h) are not presented by the *Union Dime Savings Bank* petition and record.

(a) This Court has not yet reviewed the question whether employees who have accepted the full benefits of collective bargaining agreements freely and fairly negotiated and made no claims or demands under the Act during the life of such agreements, particularly under circumstances tending to show that

both employees and employers believed in good faith that the Act did not apply to their employment relationship, can still recover liquidated damages, interest, attorneys' fees and costs under Section 16(b) of the Act. In other words, this Court has not reviewed a case where the defense has been made that circumstances such as here presented give rise to an estoppel against claims for liquidated damages under Section 16(b) of the Act as distinguished from overtime compensation under Section 7(a).

(b) This Court has not yet reviewed the question whether an employer's offer to pay full overtime compensation due under Section 7(a) made with reasonable promptness after coverage of the Act has been judicially determined, precludes any additional recovery of liquidated damages, interest, attorneys' fees and costs under Section 16(b).

(c) This Court has not yet reviewed the question whether it would be contrary to the policy of the Act to reform a collective bargaining agreement entered into and carried out under a mutual mistake regarding application of the Act to the employment relationship involved, in order to carry out the true intention of the employer and employees to make a lawful agreement for a specified regular weekly wage.

(d) This Court has not yet reviewed the question arising on this record under Section 3(d) of the Act as to whether or not the definition of the word "employer" was intended to embrace an agent who at common law would not be liable for wages contracted on behalf of his principal as an employer. The Circuit Court in its opinion in this case (R. 481) took note of the fact that it is customary practice for New York real estate concerns to manage buildings for the owners as so-called "managing agents".

The record in this case shows that petitioner, Spear & Co. Inc. during the period involved in this action was managing agent for approximately 100 New York City loft and office buildings (R. 179). To the knowledge of petitioners' attorneys there are many cases now pending in both Federal and State Courts to recover back overtime wages under the Fair Labor Standards Act against managing agents as well as against their principals—the owners. In some instances where the buildings involved have been sold and transferred to new owners and the original landlord corporation has been dissolved actions have been commenced against the managing agents alone. Individuals and firms doing business as managing agents are the victims of great injustice under the Circuit Court's ruling. Prior to this Court's decision in *Kirschbaum* v. *Walling*, 316 U. S. 517, such agents were just as unaware as employer landlords that the coverage of the Act extended to building service employees and had made no provision to reimburse or to protect themselves particularly in cases where the buildings managed were transferred and the landlord corporations dissolved. In view of the pending and probable litigation, the public interest will be promoted by prompt settlement in this Court of this question as to the scope of the word "employer" as defined in the Act.

(d) This Court has not yet reviewed the question whether an employee is entitled to recover interest on both the unpaid overtime compensation and the additional equal amount of liquidated damages which is allowed him by Section 16(b) of the Act as compensation for his employer's failure to pay overtime wages as required by Section 7(a). The penalty of liquidated damages under this Act has been recognized as severe by many courts including the Trial Judge in this case (R. 471). See also, *O'Neil* v. *Brook-*

lyn Savings Bank, 267 App. Div. 317. To permit the imposition of a further penalty in terms of interest on both overtime and liquidated damages under State statutes where the Federal statute is silent as to interest and has apparently spelled out the full measure of recovery in detail, unnecessarily increases the severity of the Act. It is doubly so in this case where petitioners paid their employees throughout the period in full compliance with the applicable union agreements and where the failure to comply with the Act was unintentional and without bad faith.

12. Two questions presented in this case (paragraphs 10(a) and (d) involve matters that have been before this Court under other circumstances but not so clearly and directly settled as to dispose of a mass of litigation which has arisen under the Act. Both these questions are also presented in the *Union Dime Savings Bank* petition, No. 387.

(a) In *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 581, and *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, 93, this Court, in construing individual employment contracts as distinguished from collective agreements with the long-established bargaining history here involved, refused to find by implication an hourly rate which would have sustained the employment as in compliance with the Act. However, there are critical differences between the facts in the above mentioned cases and the present one. In the *Missel* case, this Court said at page 581:

> "But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. Implication cannot mend a contract so deficient in complying with the law."

Of course, in the present case there was a definite contractual ceiling of 47 or 46 hours on the week's work with rate and one-half for hours worked in excess of the regular workweek. The minimum compensation always exceeded the Act's standard and could never be less in any event.

In *Warren-Bradshaw*, it is clear, as pointed out by Judge Hutcheson in the Circuit Court's opinion (124 F. (2d) 42, 44) "that they (the employees) worked on a straight hourly basis. * * *" In the present case, respondent worked on a regular weekly basis. Moreover, the provision for special overtime compensation for hours worked in excess of the regular workweek implied that compensation for any legal overtime within the regular workweek was absorbed in the regular weekly wage. This implication is fortified by respondent's regular weekly acknowledgments of full payment for all hours worked and their failure currently to demand additional compensation.

(b) Likewise, in *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, it was held that the imposition of liquidated damages under Section 16 (b) of the Act did not violate due process. It does not credit the function and fair tradition of this Court to suggest that this holding was meant to apply to every possible set of circumstances irrespective of the harshness and inequity of the result. That the holding is limited to the specific facts of the *Missel* case is borne out by the Court's detailed exposition (p. 582) of the employer's reasonable opportunity to determine in advance that his employee was covered by the Act. Until June 1, 1942, coverage in this case was distinctly doubtful. Indeed, the great weight of authority was against it. *Fleming* v. *Arsenal Building Corporation*, 125 F. (2d) 278, 281.

13. The widespread public interest and great importance of these questions to real estate owners and their

building service employees is manifest. The decision of this Court on June 1, 1942, in *Kirschbaum* v. *Walling*, 316 U. S. 517, came as a distinct surprise and shock to independent landlords of loft buildings all over the country. Radical adjustments were necessary in many cases and were promptly made for the future. However, such adjustments could not dispose of the huge existing liabilities for overtime compensation and equal amounts of liquidated damages which fell upon real estate owners still suffering in many sections of the nation from the long depression. In New York City alone, the retroactive liability of loft building owners was estimated to approximate twelve million dollars. To the knowledge of petitioners' attorneys, there are hundreds of cases pending in the Federal and State Courts in New York City at various stages of litigation involving the same or similar issues as those now presented by this case. A large number of cases have been stipulated to abide the ultimate decision in this case or in *Union Dime Savings Bank, petitioner* v. *Ira Adams, et al.*, October Term, 1944, No. 387, where some but not all of the questions of law here presented are also involved but relating to other collective bargaining agreements. The collective bargaining agreements involved in this case governed employment in more than 100 loft buildings in the Garment Center area in New York City (R. 77). The collective agreements in *Union Dime Savings Bank* v. *Adams, et al.*, embraced about 700 loft buildings, also in the Borough of Manhattan. Virtually all these loft building owners are engaged in litigation or threatened with litigation by their employees and former employees to recover overtime compensation, liquidated damages, interest and attorneys' fees for the effective period of the Act prior to June 1, 1942.

Moreover, it is possible that the retroactive liabilities will not be limited to loft buildings but will extend to office buildings—at least those buildings where, though no physi-

cal production actually occurs, the tenants administer and supervise production elsewhere. In *Rucker* v. *First National Bank*, 138 F. (2d) 699 (C. C. A. 10th, 1943), it was held in such a case that the building service employees are not covered by the Act. This Court denied certiorari. 321 U. S. 769. But in *Borella* v. *The Borden Company*, F. (2d) (C. C. A. 2d, decided July 28, 1944), a different result has been reached. If the *Borella* doctrine is ultimately sustained, the retroactive liabilities of landlords of loft and office buildings in New York City, and, in fact, throughout the country, will be substantially increased. The final and authoritative settlement by this Court of the questions here presented will necessarily be conclusive of a great mass of pending and threatened litigation.

14. Finally, this case squarely presents important questions as to the validity and effectiveness of collective bargaining agreements negotiated and carried out during a period when the application of the Act to employments of the character here involved was not seriously regarded by reasonable men, laymen, lawyers and courts alike. If the decision of the courts below in this case is to stand, "the process of collective bargaining is turned into a scrap of paper" with results that "cannot be joyfully regarded." (Rifkind, J. in *Adams* v. *Union Dime Savings Bank*, 48 F. Supp. 1022 at page 1023.)

Conclusion.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Honorable Court a full and complete transcript of the record and all proceedings in the within cause

and to stand to and abide by such order and direction as to your Honors shall seem meet, and the circumstances of the case require, and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem proper.

ROBERT R. BRUCE,
KENNETH C. NEWMAN,
Counsel for Petitioners.

McLANAHAN, MERRITT, INGRAHAM & CHRISTY,
40 Wall Street,
New York, N. Y.

Dated: August 31, 1944.

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Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court is reported in 50 F. Supp. 700. The opinion of the Second Circuit Court of Appeals is not yet reported.

Jurisdiction

The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, 28 U. S. C. 347, as amended by the Act of February 13, 1925, to which Rule XXXIX of the Rules of this Court is applicable.

Statement of Case

A sufficient statement of the case will be found in the accompanying petition (pp. 3 to 10) and in the interest of brevity will not be repeated.

Relevant Provisions of Statutes Involved

FAIR LABOR STANDARDS ACT OF 1938

Sec. 3 (d)

"'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

Sec. 7 (a)

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Sec. 16 (b)

"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the

employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

NEW YORK CIVIL PRACTICE ACT

Sec. 480

"Interest to be included in recovery. Where in any action, except as provided in section four hundred eighty-a, final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the total amount awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the total amount awarded, and included in the amount of the judgment. In every action wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded."

Specification of Errors

The Circuit Court erred as follows:

1. In holding that the collective bargaining agreements governing respondent's employment did not comply with the Fair Labor Standards Act.

2. In holding that respondent was not estopped from the recovery of liquidated damages, interest, attorneys' fees and costs.

3. In holding that petitioners' offer to pay the full overtime compensation due under Section 7 (a) of the Act, with reasonable promptness after coverage was determined, did not preclude any further liability for liquidated damages, interest, attorneys' fees and costs.

4. In holding that the allowance of liquidated damages, interest, attorneys' fees and costs, pursuant to Section 16 (b) of the Act, under all the circumstances of this case, does not violate the requirements of due process under the Fifth Amendment.

5. In holding that there was no mutual mistake of fact or law in the making and carrying out of the collective bargaining agreements and consequent frustration of the true intention of the parties, and also in holding that petitioners were guilty of laches in seeking reformation.

6. In holding that reformation of the collective bargaining agreements in this case would contravene the policy of the Act.

7. In holding that petitioner, Spear & Co., Inc., was liable as an employer under the Act.

8. In holding that, in addition to overtime compensation, liquidated damages, attorneys' fees and costs under Section 16 (b), the judgment for respondent and the other employees should include averaged interest on both overtime and liquidated damages from October 24, 1938 to the date of entry of judgment.

ARGUMENT

POINT I

The collective bargaining agreements under which respondent was employed and paid in full complied with the Act.

Respondent complains that he was not paid "at a rate not less than one and one-half times the regular rate", for hours worked in excess of the standard workweek, as required by Section 7 (a) of the Act.* "Regular rate" means "regular hourly rate"; *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 579. Hence, the critical task of the Court is to determine at what regular hourly rate respondent was employed throughout the period October 24, 1938 to February 5, 1942.

But respondent was neither hired nor paid by the hour. No hourly rates were provided in the collective bargaining agreements, nor was any formula or method for determining hourly rates prescribed therein.

Under the collective agreements, respondent's regular rate was a weekly rate, as follows:

October 24, 1938 to February 2, 1939—$27.75 per week for a 48-hour week
February 3, 1939 to August 1, 1940—$28.75 per week for a 47-hour week
August 2, 1940 to February 5, 1942—$29.33 per week for a 46-hour week

(Finding No. 30, R. 33).

In the absence of any special circumstances, the simple rule set forth in *Overnight Motor Co.* v. *Missel, supra,* in

* In the previous action of *Arsenal Building Corporation et ano.* v. *Walling*, 316 U. S. 517, the construction and effect of these collective agreements was not litigated. The sole issue was coverage. Petitioners' counsel in that action (Transcript of Record, p. 27) admitted "for the purpose of this suit only that they are not and have not been conformed to the provisions of Section 7 of the Fair Labor Standards Act * * *"

the footnote at page 580, would doubtless apply: "Wage divided by hours equals regular rate".* However, in *Warren Bradshaw Co.* v. *Hall,* 317 U. S. 88, 93, it is strongly suggested that a different rule applies where the weekly salary is intended to include additional compensation for overtime hours. In the present case, there is no express agreement to that effect, but there are substantial reasons for implying such an understanding from the terms of the collective agreements and the conduct of the parties thereunder.

First, the collective agreements provided for overtime beyond the regular workweek of 47 or 46 hours at rate and one-half the regular weekly wage, thereby implying that all overtime worked within the regular workweek was absorbed in the regular weekly wage. Second, respondent signed a weekly payroll acknowledging payment in full for all hours worked each workweek. Third, and perhaps most conclusive, at no time from the effective date of the Act on October 24, 1938 to February 5, 1942, the end of the period for which respondent sues, did respondent or the union representing him ever demand any additional compensation for the regular workweek.

The implication that the regular weekly wages prescribed by the collective bargaining agreements were intended to include full compensation for any legal overtime included within the specified workweek, is not unreasonable. It is a fair and natural inference from the agreement to pay and the agreement to accept a specified number of dollars per week for a specified number of hours worked each week.

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* Findings 21 and 22 (R. 30-31) are not inconsistent with an argument that respondent was employed on a weekly rate and had no express hourly rate. Deductions for absence or additions for overtime beyond the regular workweek, were expressed in fractions of the regular workweek. Thus when the contract called for 46 hours per week, the employee who worked 50 hours would receive his regular week's salary plus 6/46ths of such salary or rate and one half the regular weekly wage.

Such an implication will uphold the legality of the collective bargaining agreements. The Court should endeavor to sustain the legality of a contract, particularly where the party seeking to avoid his obligation on the plea of illegality has had the benefit of full performance.

Steele v. *Drummond*, 275 U. S. 199, 205;
Lorillard v. *Clyde*, 86 N. Y. 384, 387.

This principle would seem to apply with peculiar force to collective bargaining agreements in the interest of promoting fair and stable labor relations.

In *Overnight Motor* v. *Missel*, 316 U. S. 572, 581, and *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, 93, this Court, in construing individual employment contracts as distinguished from collective agreements with the long-established bargaining history here involved, refused to find by implication an hourly rate which would have sustained the employment as in compliance with the Act. However, there are critical differences between the facts in the above mentioned cases and the present one. In the *Missel* case, this Court said at page 581:

> "But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. Implication cannot mend a contract so deficient in complying with the law."

Of course, in the present case there was a definite contractual ceiling of 47 or 46 hours on the week's work with rate and one-half for hours worked in excess of the regular workweek. The minimum compensation always exceeded the Act's standard and could never be less in any event.

In *Warren-Bradshaw*, it is clear, as pointed out by Judge Hutcheson in the Circuit Court's opinion (124 F. (2d) 42, 44) "that they (the employees) worked on a straight hourly basis. * * *" In the present case, respondent worked on a regular weekly basis.

Petitioners do not contend that the collective agreements in this case complied with the Act because the regular weekly wage included compensation for overtime hours equal at least to time and one-half the statutory minimum rate. Argument based on that construction of the Act was rejected in the *Missel* case (p. 578). It is contended, however, that the regular hourly rate reasonably to be implied from the collective agreements exceeded the statutory minimum at all times,—indeed, was never less than 55¢ per hour (R. 16), compared to the statutory rate of 30¢ per hour—and that respondent was paid in full for his statutory overtime, in accordance with Section 7 (a) of the Act, on the basis of such implied rate.

The collective bargaining agreements in this case fully measure up to the declared policy of the Act, as expressed in the *Missel* case and in *Walling* v. *Belo*, 316 U. S. 624. In accordance with the spirit of the closing paragraph of the majority opinion in the *Belo* case, this Court should not, by rigid interpretation and application of the Act, upset collective bargaining arrangements which have proven mutually satisfactory to the parties.

POINT II

Respondent should be estopped from recovery of liquidated damages, interest, attorney's fees and costs.

By virtue of Sections 6 and 7 of the Act, Congress mandated that employers whose employees were entitled to the benefits of the Act should receive minimum wages and overtime compensation at the rates and on the basis

specified. Thus was established a uniform national policy, creating for employers certain obligations with respect to minimum wages and maximum hours.

The liability created in Section 16 (b) of the Act for liquidated damages is of a different character. It is compensatory damage to an employee whose employer has violated Sections 6 and 7 of the Act. Recognizing the distinction between the wage requirements of these sections and the liability established by Section 16 (b) for failure to carry out these wage requirements, the United States Circuit Court of Appeals for the Fourth Circuit has held, in a well reasoned opinion, that employees who have received the full compensation due under Sections 6 and 7 may release or waive their individual claims for damages under Section 16 (b).

Guess v. *Montague,* 140 F. (2d) 500.

If an employee may waive his claim for liquidated damages under Section 16 (b) of the Act, there can be no sound reason why employee may not be estopped from such recovery by inequitable conduct.

While no deliberate fraud is charged against respondent, a constructive fraud upon petitioners is the plain result of the facts in this case. Unless respondent, his fellow employees and their union representatives acted under a mistake of law regarding application of the Act, they were guilty of fraud, in waiting more than three years until the termination of the collective agreements while building up substantial claims against petitioners for overtime, liquidated damages and interest, not to mention attorneys' fees and costs. See opinion of Rifkind, J. in *Berry* v. *34 Irving Place Corp.,* 52 F. Supp. 875, 881, where the Court, after trial in a similar case, said:

> "Seriously to urge that the Union representatives were not mistaken is to charge them with fraud."

Certainly nothing in the policy of the Act or the law generally will condone and aid conduct tantamount to fraud.

Mortenson v. *Western Light & Telephone Co.*, 42 F. Supp. 319.

POINT III

Petitioners' offer to pay respondent full overtime compensation under Section 7 (a), made with reasonable promptness after coverage was established by this Court, precluded any further liability.

Section 7 (a) of the Act does not fix the time when overtime compensation must be paid. "The intention to permit a reasonable time for payment should be inferred." Callahan, J., dissenting in *O'Neill* v. *Brooklyn Savings Bank*, 267 App. Div. 317 at page 324; aff'd without opinion, 293 N. Y. 666.

Under respondent's interpretation, petitioners became liable on each weekly pay day after October 24, 1938 for overtime worked during the previous week, and immediately upon failure to pay such overtime became liable for an equal amount of liquidated damages. In addition, the Circuit Court has now held that petitioners must pay interest on both of these amounts from each weekly pay date when they fell due.

Plainly, what may be a reasonable time for employers such as petitioners to pay overtime in 1944 does not hold for the period 1938 to 1942.

The Administrator of the Fair Labor Standards Act has never lacked zeal in his assertions of coverage of the Act. Yet in the various Interpretative Bulletins issued from time to time to guide employers with respect to the construction of the Act, there was never any hint that

the Administrator regarded building service employees of independent landlords of loft and office buildings as covered. (See Interpretative Bulletin No. 1, issued Sept. 22, 1938 and Interpretative Bulletin No. 5 issued Dec. 2, 1938 and reissued in revised form Nov. 27, 1939.)

In March, 1940, the Administrator commenced an injunction suit in the Southern District of New York against petitioners as a "test" case to determine the coverage of the Act as applied to such situations. The case, *Fleming* v. *Arsenal Building Corporation,* 38 F. Supp. 207, a forerunner of this action, was decided on April 11, 1941 by Judge Woolsey, who held the Act inapplicable and dismissed the government's complaint.

Meanwhile on June 7, 1940, the Act was held inapplicable to the employees of a loft building landlord whose tenants concededly produced goods for commerce, in *Killingbeck* v. *Garment Center Capitol, Inc.,* 259 App. Div. 691. At the time there could have been little doubt as to the soundness of this result in the minds of the judges of the New York Appellate Division, First Department, and of the Court of Appeals, for leave to appeal was promptly denied by both. 259 App. Div. 1076; 284 N. Y. 818.

On December 30, 1941, the Circuit Court of Appeals for the Second Circuit reversed Judge Woolsey's decision, dismissing the Administrator's injunction suit (125 Fed. [2d] 278.) Judge Learned Hand's opinion evidences no compelling conviction, conceding (at p. 281) that "so far the score is four to one against the view we take" and "Obviously the question will not be set at rest until the Supreme Court makes an authoritative ruling."

On June 1, 1942 this Court settled the application of the Act as applied to employees of the two loft building landlords then before the Court but admitted, with slight consolation for bewildered property owners and their

lawyers, that the search for "a dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is as rewarding as an attempt to square the circle." *Kirschbaum* v. *Walling* and *Arsenal* v. *Walling*, 316 U. S. 517, at page 520.

The search is not yet ended. Cf. *Rucker* v. *First National Bank*, 138 F. (2d) 699 (CCA 10th, 1943) cert. denied 321 U. S. 769; and *Borella* v. *The Borden Company*, —— F. (2d) ——, (CCA (2d) decided July 28, 1944).

Adding the uncertainty of the law to the facts that respondent employees never claimed any benefits under the Act until June, 1942, that the powerful labor union representing the interests likewise made no claims, and that petitioners carried out the collective bargaining agreements in complete good faith, it becomes not only unreasonable but unmoral to hold that petitioners should have paid overtime each week during the period 1938-1942.

If payment of overtime to respondent by petitioners could not reasonably be required until after the decision of this Court in *Kirschbaum* v. *Walling* on June 1, 1942, then certainly the offer to pay the accumulated overtime wages in July, 1942, before commencement of this action, was prompt under the circumstances and petitioners did not "violate" Section 7 (a). There being no violation of Section 7 (a), by virtue of petitioners' offer which respondent refused, no liability for liquidated damages, interest, attorneys' fees and costs could arise under Section 16 (b) (See dissenting opinion in *O'Neill* v. *Brooklyn Savings Bank*, 267 App. Div. 317).

POINT IV

To hold petitioners for liquidated damages, interest, attorneys' fees and costs, would be an unconstitutional application of Section 16 (b) of the Act under the circumstances of this case.

The harshness and severity of Section 16 (b) has been the subject of comment by many courts. No set of circumstances arising under the Act to date has presented results more shocking than those illustrated here.

Two approaches from the viewpoint of due process are possible: First, the obligation on which the penalties or so-called "liquidated damages" under Section 16 (b) were predicated in this case, were too vague and indefinite.

Connally v. *General Construction Co.*, 269 U. S. 385;
Small v. *American Sugar Refining Co.*, 267 U. S. 233;
U. S. v. *Cohen Grocery Co.*, 255 U. S. 81;
Standard Chemicals & Metals. Corp. v. *Waugh Chemical Corporation*, 231 N. Y. 51.

Second, the cumulative factors and circumstances here presented produce a total result so oppressive and unjust as to offend established notions of due process.

Anuchick v. *Trans-American Freight Lines, Inc.*, 46 F. Supp. 861;
Ex parte Young, 209 U. S. 123;
Cotting v. *K. C. Stockyard Co.*, 183 U. S. 79.

POINT V

Reformation of the collective bargaining agreements for mutual mistake of law to carry out the true intention of the parties would not contravene the policy of the Act.

(a) *The Relevant Findings*

The Courts below found that there was no mutual mistake of law in the making and carrying out of the collective bargaining agreements and consequent frustration of the true intention of the parties. The short answer with respect to the finding of no mutual mistake was given by Judge Rifkind of the United States District Court for the Southern District in a similar litigation, *Berry* v. *34 Irving Place Corp.*, 52 F. Supp. 875, where he said at page 881:

> "Seriously to urge that the Union representatives were not mistaken is to charge them with fraud."

In any event, the evidence is rather overwhelming that the application of the Act to building service employees was discussed during negotiation of the McGrady agreement in December, 1938 and January, 1939, and that neither the union nor the employer-representatives believed that the Act applied to the employment relationships involved (R. 90-91, 185-186, 291-292, 322-325, 418-419).

The true intention of the parties is manifest from the collective agreements which they actually negotiated and carried out. It is not lightly to be presumed that a strong labor union, acting for more than 15,000 members and responsible associations acting for the employers, intended to violate the law of the land, particularly when their dealings were supervised and aided by outstanding public officials and citizen mediators and arbitrators ex-

pert in labor matters. The parties intended lawful arrangements and intended, moreover, that a specified number of dollars per week should be full compensation for a specified number of hours worked each week. The fact that there was no mutual understanding between the parties in their negotiations with respect to specific hourly rates or a formula for determining such rates (see Finding No. 16, R. 29-30) is immaterial. The general objectives of a lawful agreement and specified weekly compensation having been agreed upon, the parties necessarily intended whatever means or method would achieve the agreed objectives.

The finding that petitioners delayed unreasonably in seeking reformation (Finding No. 17, R. 30) is also clearly erroneous. This Court did not determine until June 1, 1942 that building service employees were under the Act. Respondent commenced this action for back overtime wages on August 13, 1942. Petitioners' answer promptly counterclaimed for reformation of the applicable collective bargaining agreements on the ground of mutual mistake of law.

(b) *Reformation is Within the Power of the Court*

In carrying out the terms of the Alger Agreement from October 24, 1938, when the Act became effective until the McGrady Agreement succeeded it, and in entering into and carrying out the McGrady Agreement from February, 1939 to February 5, 1942, petitioners and respondent intended to comply with law and further intended that the specified regular weekly wages should be paid and accepted for the specified maximum workweek of 47 or 46 hours. Because of their mutual and bona fide mistake as to the application of the Act, the true intention of the parties has been frustrated. The Court is not asked to make new contracts for the parties but to reform the language of the contracts they did make in order to give effect to their true intention. Because of their mistake

as to the application of the Act, the parties did not include hourly rates or a formula for determining hourly rates which would, in compliance with the Act, yield the agreed weekly wage. The Court in reforming these contracts merely supplies the hourly rate, which is the means necessary to carry out the intended objectives.

The power of the Court to grant relief under these circumstances is established.

> *Philippine Sugar Estates Development Co., Ltd.* v. *Government of the Philippine Islands*, 247 U. S. 385, 389;
> *Millspaugh* v. *Cassedy*, 191 App. Div. 221;
> *Berry* v. *34 Irving Place Corporation*, 52 F. Supp. 875, 881.

Had the parties apprehended the scope of the Fair Labor Standards Act in June, 1938, when it became law, they could, and would have written their collective contracts so as to carry out their intention to comply with law and provide the same weekly earnings for the same maximum workweek actually agreed upon between them. Agreement upon an hourly rate yielding wages no greater than before the Act, was lawful.

> *Walling* v. *Belo*, 316 U. S. 624;
> *Atlantic Company* v. *Walling*, 131 Fed. (2d) 518;
> *White* v. *Witwer Grocer Co.*, 132 Fed. (2d) 108;
> *Shepler* v. *Crucible Fuel Co.*, 140 Fed. (2d) 371.

That which the parties could lawfully have done in October 1938 or February 1939, this Court can now do by way of reformation if the parties so intended. In substance and purpose the Act has never been violated.

POINT VI

Petitioner Spear & Co., Inc. is not an employer within the meaning of the Act.

Petitioner Spear & Co., Inc. dealt with the employees of the Arsenal Building and the world in general as an agent. The payroll sheets which respondent and the other employees signed each week designated Arsenal Building Corporation as "Employer" and Spear & Co., Inc. as "Agent," and show that the employer's Social Security tax was paid by Arsenal Building Corporation (Def. Ex. H admitted R. 166—folder of exhibits). Respondent stated that he was employed by the Arsenal Building Corporation, and that is the name appearing on the reverse side of his Social Security card as employer (Def. Ex. E admitted R. 66—folder of exhibits). The management agreement between Spear & Co., Inc. and the owner (Pl. Ex. 4, R. 438-440, admitted R. 52) refers to Spear & Co., Inc. as the "Agent."

There was never any assumption of liability by Spear & Co., Inc. for the wages of respondent nor intent to do so. At common law there would be no liability to respondent or the other employees of the Arsenal Building for such wages.

Hall v. *Lauerdale*, 46 N. Y. 70;
Keskal; et al. v. *Modrakowski*, 249 N. Y. 406.

We do not believe it was the intention of Congress to abrogate established rules of agency in cases arising under the Act. There is nothing in the Act itself or in the legislative history to justify so sweeping a conclusion. It has been held that it is not the purpose of the Act to create new wage liabilities.

Bowman v. *Pace Co.*, 119 F. (2d) 858, 860;
Helena Glendale Ferry Company v. *Walling*, 132 F. (2d) 616, 620;
Maddox v. *Jones, et al.*, 42 F. Supp. 35, 40-42.

To hold Spear & Co., Inc. liable as an employer creates an absurd and unreasonable result. The rule of statutory construction announced by this Court in *U. S. v. American Trucking Association*, 310 U. S. 534, 542, is applicable.

POINT VII

Section 16 (b) establishes a uniform and exclusive measure of recovery under the Act and forecloses additional damages under State Law.

No provision of the Act provides for recovery of interest. Congress undoubtedly intended that the statutory award of liquidated damages would compensate for any and all damages resulting from the retention of overtime compensation or minimum wages.

Overnight Motor Co. v. *Missel*, 316 U. S. 572, 583;
Pedersen v. *Fitzgerald Construction Co.*, 293 N. Y. 126 (dissenting opinion).

The Fair Labor Standards Act was intended to establish a uniform national policy with respect to minimum wages and maximum hours. This intention should govern the construction and application of all its provisions. Uniform treatment will not be afforded all employees if some are entitled to recover interest and others denied it depending on the statutes of the various states.

The fact that Congress did not provide for interest while expressly authorizing attorneys' fees and costs leaves no doubt that interest was excluded as an element of recovery. Sec. 480 of the New York Civil Practice Act cannot extend the scope of the Fair Labor Standards Act. The latter is paramount and exclusive.

Chicago, M., St. P. & P. R. Co. v. *Busby*, 41 F. (2d) 617;

Murmann v. *N. Y., N. H. & H. R. R. Co.*, 258 N. Y. 447;
Norton v. *Erie Railroad Company*, 163 App. Div. 468.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari in this case should be granted.

ROBERT R. BRUCE,
KENNETH C. NEWMAN,
Counsel for Petitioners,

McLANAHAN, MERRITT, INGRAHAM & CHRISTY,
40 Wall Street,
New York, N. Y.